Filed 2/25/09; Certified for Partial Pub. 3/11/09 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>MARIO FLAVIO GARCIA,<br>Defendant and Appellant. | C054729<br>(Super. Ct. No. 62055517) |

Defendant Mario Garcia appeared on a video surveillance tape leaving the Thunder Valley Casino with Christie Wilson early in the morning of October 5, 2005. They were last seen walking towards his car. Wilson was never seen again and her body was never found. A jury convicted defendant of first degree murder (Pen. Code, § 187) of Wilson and possession of a deadly weapon (Pen. Code, § 12020, subd. (a)(1)). The court found true allegations that defendant had a prior serious felony conviction (Pen. Code, §§ 667, subds. (a) & (b)-(i); 1170.12,

subds. (a)-(d)). Sentenced to 59 years to life in state prison (25 years to life for the murder, doubled, plus four years for the weapons charge and five years for the prior felony enhancement), defendant appeals.

Defendant contends the trial court committed numerous errors in admitting evidence and instructing the jury and the conviction for murder is not supported by the evidence. He contends the court erred in failing to suppress evidence from defendant's car and his interview with police, as well as in admitting evidence of his bad character at work, expert evidence on date rape drugs, an officer's opinions and conclusions about the case and an exhibit summarizing testimony in a timeline. Defendant contends there was instructional error as to reasonable doubt, failure to explain evidence, and third party culpability. He contends there was insufficient evidence of first degree murder under either a theory of premeditation and deliberation or felony murder based on kidnapping. He asserts the evidence is sufficient to support a conviction only for involuntary manslaughter.

We affirm. While we find it was error to use defendant's assertion of his Fourth and Fifth Amendment rights in ending the interview with the police as evidence of consciousness of guilt, the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's consciousness of guilt. We reject defendant's remaining contentions. There was sufficient

evidence of first degree murder on a felony-murder theory predicated on kidnapping.

## FACTS

Because Christie Wilson disappeared and her body was never found, the prosecution's case against defendant for murder was based on circumstantial evidence. The prosecution sought to prove, first, that Wilson's disappearance meant that she was dead, and second, that defendant murdered her.

### *Christie Wilson*

Christie Wilson's mother described her as driven, organized, goal-oriented and a good student. Wilson had a "huge heart," was outgoing and loved animals; she tried to see the best in people. Wilson was close to her family and friends and kept in contact with them frequently by phone and e-mail. On October 4, 2005, she exchanged voice mail with her mother and sent an e-mail of her cat dressed up for Halloween to a number of family and friends. That was the last communication they had with her.

Wilson and her sister took kickboxing classes together. Wilson knew how to defend herself and was aggressive. Wilson's stepfather was a sergeant with the San Jose police. He had warned Wilson about protecting herself in case of attack. He gave her tips on how to act if attacked, suggesting she tell an attacker that she had a venereal disease.

Wilson graduated from Chico State in 2000 with a degree in production operations management. She held a number of jobs in high tech industries, a field that did not suit her. She was terminated from some jobs and at times collected unemployment insurance.

Wilson struggled with depression after college. In June 2005, she was assessed by a psychiatrist, who diagnosed major depression, recurrent severe. She was taking the antidepressant drug Lexapro. In September 2005, Wilson ordered a CD and DVD version of a self-help program for depression and anxiety.

Wilson had an off and on relationship with Daniel Burlando. Her mother and stepfather and some friends did not approve of the relationship. Wilson and Burlando fought; they both had stress over jobs or the lack of jobs and Wilson did not approve of how Burlando lived. In March 2005, they had a physical fight over a cell phone. Burlando called the police and both were arrested. Neither was prosecuted. Burlando had scratch marks on his torso and neck from the fight.

Wilson liked to gamble; she had met Burlando at Cache Creek Casino. She had a player's card, that tracked play and offered rewards, at Thunder Valley Casino. Wilson had a great time when she won, but lost control when she lost. She borrowed money to gamble and her gambling concerned Burlando, as well as her mother and stepfather.

By the fall of 2005, Wilson was taking steps to improve her life and her demeanor improved. She was very excited about a job prospect at Zoom Eyeworks in Berkeley, an excitement she shared with family and friends. Her first two interviews with the company had gone well and she e-mailed the vice president about her continued interest on October 3. A third and final interview was scheduled for October 7; Wilson did not show up for the interview.

***Christie Wilson's Disappearance***

The evening of October 4, 2005, Burlando went to a family get-together and did not invite Wilson. When he returned home, she was not there. He invited a friend over. Around 10:30 p.m., Wilson called and said she was finishing up at Thunder Valley Casino. Burlando went to bed at 2:00 a.m. and never heard from Wilson again.

Wilson went to Thunder Valley Casino that night before 7:00 p.m. She played blackjack at various tables and met defendant at one. Around 9:30 p.m. they sat at blackjack table 36, where they stayed for about three and a half hours. They were friendly to each other. Wilson appeared happy and was drinking. She said her boyfriend had hit her that morning and pulled her hair. She raised her arm to show a bruise. Wilson talked about losing her job and getting another that would allow her to travel the world. Defendant told her he could get her a

job. At one point, Wilson went to the restroom; she complained of a stomach ache and diarrhea.

Defendant bought Wilson a glass of wine and a man bought a bottle for the table. As the evening progressed, Wilson and defendant became intoxicated and loud. They were kissing and hugging and acting like boyfriend and girlfriend. Wilson was losing and she borrowed money several times from defendant; she also borrowed from another man at the table. As she lost, her demeanor changed and Wilson became angry and abusive. She called the dealer names. Her behavior became so bad that a pit boss was called, who told her to stop or she would be asked to leave. Defendant told her to calm down. Several times he tried to get her to leave, but she would not. Finally, just before the casino was prepared to throw them out, they left. As they did, the man who had lent Wilson money asked about his money. She threw chips at him and called him a name. Wilson and defendant together left the casino at 1:13 a.m., walking towards his car. Wilson was never seen again.

Video surveillance of the parking lot showed defendant and Wilson walking towards his car at 1:13 a.m. As they are out of view in the darkness, there are four flashes from a car's headlights, then two more flashes. The flashes are similar to those caused by a keyless entry system to unlock a car. Three minutes and 41 seconds after the flashing, headlights in the same vicinity come on and a white car leaves the parking lot. A

surveillance specialist from the Los Angeles Police Department enhanced the video. The enhanced video shows the white car leaving the parking lot with only one occupant, defendant, inside. The car turned right on Athens Road, proceeding westbound.[1] The video cameras do not show Wilson returning to her car at any time in the hour after 1:20. There was no report of a struggle or a cry for help in the parking lot that night. Security guards present that night and a deputy sheriff called for a disturbance did not notice a woman in distress.

No one at the casino that night noticed any injuries on defendant's face.

Wilson's cell phone was found under the blackjack table. No one came forward to claim it over the next few days. Eventually it was turned over to the police.

***Initial Response to Wilson's Disappearance***

On Wednesday, October 5, Burlando called Wilson several times, but she did not answer. He called hospitals and jails, looking for her. That night he had dinner with friends, who offered to go to the casino to look for Wilson. Burlando declined.

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[1] Sergeant McDonald testified that one leaving the casino and going to Highway 65, as defendant said he did, would turn left on Athens Road. Turning right on Athens takes one to Fiddeyment Road, where Athens dead ends. From Fiddeyment Road one can go to Lincoln and Highway 193. It is about the same distance to Interstate 80 by either Highway 65 or Highway 193.

The next day, Burlando went to Thunder Valley Casino and found Wilson's car. He asked the casino to check her player's card and page her. He looked for her everywhere. While waiting for the pit boss, he played a little blackjack. He called Tim Nordloff, a close friend of Wilson's, who had not spoken to Wilson since earlier that week. Then he called Wilson's parents and told them he was going to file a missing person's report. After that call, Burlando called the police, as did Pat Boyd, Wilson's stepfather and a San Jose police sergeant.

Officer Mark Roddy responded to the missing person's call. He met with Burlando, who was cooperative and concerned, and searched the apartment. Burlando continued to be cooperative through follow-up investigation. He allowed the police access to his apartment, computer and phone records, and gave a two-hour taped interview. Police found a stun gun in Burlando's car.

After contacting Burlando, Roddy went to Thunder Valley Casino and found Wilson's car. He also contacted the casino's surveillance supervisor. Photographs of Wilson and Burlando were sent to Thunder Valley Casino to match to surveillance tapes.

The next morning there was a neighborhood search. A BOLO (be on the lookout for) was issued to three neighboring counties. A more far reaching APB (all points bulletin) was issued. A flier, a critical reach bulletin, was sent to other

agencies. Nationwide databases of missing persons data were checked; there was no hit. Numerous additional searches, both governmental and volunteer, were conducted, some using dogs. No trace of Wilson was found.

There was no activity on Wilson's bank account after October 4. No wages were paid on Wilson's social security number after September. No data on Wilson appeared after October 4 on the Lexis/Nexis person locator tool. There were no e-mails generated by Wilson after October 4, 2005, and there was no logon activity on her e-mail account. There was no activity for Wilson in DMV records after October 5. Contacts with various police departments revealed nothing. No passport was issued in Wilson's name.

***Defendant's Activities October 3-7***

Defendant worked as a senior technical project manager at Sutter Health Information Technology. For several years he was assigned to an electronic ICU project that allowed remote monitoring of several hospitals at one central location. The week of October 3-7, 2005, was the kickoff of a major upgrade to the project. On Monday, defendant worked at the Mather site all day. Tuesday, October 4, he worked at the data center from 10:00 a.m. to 5:30 p.m. He sent his supervisor an e-mail at 5:25 p.m. The e-mail expressed his frustration with a coworker and said he was "having some tequila tonight." Others could

tell the supervisor “that this day will live in infamy.” Defendant went to Thunder Valley Casino that night.

At 7:51 a.m. the next morning, Wednesday, October 5, defendant made an outgoing call on his cell phone to his wife. The call was handled by the north sector of the Lone Star cell tower. A Sprint Nextel manager believed, based on the cell tower used, that this call was not made from defendant’s residence, but rather from a location to the north.

Defendant was assigned to be at the data center Wednesday to meet and escort vendors who were making installations for the project. He was expected to be there all day, with a meeting scheduled for 9:00 a.m. One of the vendors arrived at 9:05. Defendant was not there to let him in, so the vendor called him. Defendant said he had gotten caught up in an accident and was running late. Defendant arrived shortly after 10:00. Defendant had scratches on his face and a burst blood vessel in his eye. Someone said the injuries were from a motorcycle accident. A coworker joked he hoped the other guy looked worse. Defendant explained he was working in his yard with a tractor and a branch got caught in the cage.

Defendant left work at 11:14 a.m. It was unusual for him to be late for an important meeting and to leave early. Defendant did not check in with his supervisor as he usually did. The next day defendant took sick leave. Friday he

telecommuted from home, although that arrangement was not preapproved as required.

On Thursday, October 6, defendant went to the UC Davis Ambulatory Care Center. He reported pain in his left eye, telling the doctor he fell from a 15-foot tree when the branch broke. Defendant was upset. He had blurry vision in his left eye, a swollen lower lip, and multiple abrasions to his face, torso and arms. He was treated with antibiotics for a possible skin infection and referred to an eye doctor for his eye. The nurse did not believe his injuries were consistent with a fall from a tree.

Later that day, defendant saw Dr. Barnes, a doctor of optometry. Defendant's chief complaint was blurred vision. Dr. Barnes found multiple facial abrasions, a blood blister in the eye, and a significant eye infection on the eyelid margin. He believed the blurred vision was caused by a force separate from that causing the infection. The nature of the eyelid injury was unusual to be caused by contact with a plant because of the degree of pus formation. It was hard to imagine blurred vision that could be corrected by a lens could be caused by falling out of a tree. The doctor believed the infection was caused by gram-negative bacteria. Plants were associated more with fungi than bacteria and any bacteria seen in association with soil was usually gram positive. Defendant's injuries were,

however, consistent with clawing from fingernails and a punch to the eye.

***Sergeant McDonald Takes Over Investigation and Interviews Defendant***

After the Sacramento police found Wilson's car at Thunder Valley Casino and viewed the videotape showing her leaving, the case was passed to the Placer County Sheriff's Department. On Saturday, October 8, Sergeant Robert McDonald was briefed on the case. He obtained the videos from Thunder Valley Casino and was able to identify the man leaving with Wilson as defendant through his player's card. McDonald confirmed defendant's residence by driving by it.

The next morning, Sunday October 9, McDonald went to defendant's residence and found him in the front yard. McDonald told him he was investigating a missing person's case and defendant had been seen in the missing person's company. Defendant was visibly nervous and looked towards the house. He said he had been at the casino and lost a large amount of money. If his wife found out, he would be in big trouble. Defendant verified that he met Wilson; he claimed they just happened to leave at the same time. On the way towards the car, Wilson realized she lost her cell phone and went back. Defendant said both he and Wilson were intoxicated. He claimed he would not have had sex with a strange woman because he feared herpes.

McDonald returned to the casino and asked that the surveillance tapes be reviewed to determine if Wilson returned

to the casino for her cell phone. That afternoon, after he was told there was no sign of Wilson on the tapes, he returned to defendant's home for a fuller statement.

McDonald asked defendant to come to the office and give a statement. When McDonald asked what car defendant drove that night, defendant was reluctant to answer and asked to call a friend who was an attorney. When the attorney friend arrived, defendant pointed out the car and drove it to the station. Before defendant gave a statement, his attorney friend noted, "[l]ooks like somebody smacked you under your eye." Defendant said he had an accident with a tractor and a tree and had poison oak on his face.

McDonald began the interview by telling defendant he was not under arrest, but under suspicion. His statement was voluntary and the door was open; defendant was free to leave and not under compulsion to do anything. Defendant stated he went to Thunder Valley Casino Tuesday after work. He met Wilson and probably flirted with her; he was pretty drunk. Wilson reported mental problems and problems with her boyfriend; she showed bruises on her arm. She was losing "big time." Defendant loaned her $50 and another man at the table loaned her $100. Wilson left the table to use the restroom or make calls; she lost her phone. They left the casino together, but Wilson was not with him. Wilson had been calling the dealer names and the pit boss was threatening to throw her out. Defendant got home

at 2:00 a.m. He took Highway 65 to Interstate 80 and then went up Highway 49.

McDonald told defendant they would check the car for fingerprints, saliva, hair, skin and body fluids. He encouraged defendant to tell him everything now. McDonald wanted to take a picture of the "mouse" or small black eye that defendant had. Defendant's attorney friend said okay, but defendant refused after confirming that he was not under arrest. McDonald told him his refusal could be used against him. The interview ended. McDonald attempted to take a picture of defendant, but defendant held his hands up in front of the camera lens. Defendant then left the interview room.

The next day, Monday October 10, a search warrant was issued for defendant's person, car and residence. It was served Tuesday; the residence was searched Thursday. Defendant was arrested Friday on a weapons charge, based on a collapsible baton found in the trunk of his car.

***Defendant's Activities October 9-14***

Early Sunday morning, defendant purchased a variety of anti-itch creams and laundry detergent at Long's Drugs. In addition to his interview with McDonald, defendant, who did not have regular garbage service, made a trip to the landfill to dispose of garbage. The attendant noted he looked beat up. That night defendant took a picture of himself with a digital camera from work. He later deleted the photo but it was able to

be recovered. The photo showed defendant had marks on his chin, face, forehead and neck.

On Monday, defendant worked half the day and took the other half off. He also made a return visit to the eye doctor. He told the doctor he felt much better and the abrasions on his arms were due to poison oak. Defendant sent an e-mail to work explaining he had poison oak. That night defendant did several Google searches on the computer for the term forensics.

Tuesday defendant e-mailed a request to work remotely, claiming he had personal issues that prevented him from coming to the office. At 5:17 p.m., he went to his supervisor. She noticed welts on his forearm covered with a white lotion and that he was growing a beard. That night defendant searched the computer regarding Penal Code section 1524 on warrants.

On Wednesday defendant telecommuted to work, participating in a morning conference call. He e-mailed his supervisor explaining he had problems due to being in the wrong place at the wrong time and had retained an attorney. Defendant's telecommuting was formally approved. He returned to the medical clinic, complaining of poison oak. That day he performed several Google searches, using the term "TOXICOLOGY + VALLEY." He visited a Web page, for 23 seconds, which discussed rave/date drug screens. The Web page listed a number of rave/date drugs and indicated that urine was the preferred matrix for this toxicology panel.

Defendant worked at the data center on Thursday. The next day, Friday, he took a sick day, claiming he had medical problems and went to the hospital with chest pains. His supervisor sent an e-mail requesting that he return a work laptop computer. He responded by voice mail, saying he would. Defendant was arrested that day. When defendant was booked, he told the officer he had poison oak; he had gotten it on Sunday. As the officer prepared to note the date, defendant said he got it two weeks ago.

***Search of Defendant's Car***

The car defendant drove to the casino October 4 was a 2004 Toyota Camry which was sold with a trunk mat and carpet. Enterprise Rent a Car had purchased the car used in January 2005; it was involved in an accident shortly thereafter. Enterprise sold the car to B. N., who repaired it and sold it to defendant in the summer of 2005. It was sold with a carpet in the trunk; the carpet was missing when the police searched the car. One of defendant's coworkers had seen the carpet in the trunk before.

Defendant left the car with the sheriff's department, in a secured area, the day of his interview. It was searched two days later. The car was clean and the back seat appeared to have been cleaned and vacuumed. Nonetheless, trace evidence was found implicating defendant.

A detective found a collapsible night stick inside the trunk. This weapon was the basis of defendant's arrest for possession of a deadly weapon.

An evidence technician found a hair, identified as 1 TH, wedged in the exterior front passenger door handle. There was testimony the hair was in the catagen stage, transitioning from growing to dead, and required some force to extract from the head. DNA testing revealed the hair matched Wilson's at 15 markers. The statistical probability of a match was 1 in 3.2 sextillion African-Americans, 1 in 720 quintillion Caucasians, and 1 in 6.2 sextillion Hispanics.

A second search of the car was performed on October 17. A human hair consistent with Wilson's, identified as 19 TH, was found in a tape lift from the trunk area. This hair was in the anagen or active growing stage and would require force to extract from the head. The hair also had an unusual diameter variation and dramatic color change, as did the comparison hair from Wilson's hairbrush. DNA analysis matched the hair to Wilson's profile, a profile occurring once in every 720 quintillion Caucasians, 3.2 sextillion African-Americans, and 6.2 sextillion Hispanics.

Another human hair was found in a tape lift from the rear passenger floorboard. It fell within the standards of Wilson's hair. Mitochondrial DNA testing could not exclude Wilson as the source. A similar profile was found in 1 of 384 African-

Americans and Caucasians and 1 in 256 Hispanics. In performing the mitochondrial testing, there were two instances where the analyst's DNA ended up in the evidence.

The car was turned over to the Department of Justice for further examination. Stains on the rear seat tested presumptively positive for blood. There were five small blood stains. After conducting an experiment, a criminalist determined the stains were consistent with a splatter and could be caused by scratching. The splatter occurred at medium to high velocity when the car door was open. It was consistent with a single event. DNA testing revealed a mixture of two people; defendant matched at 15 loci and Wilson at 8. The DNA profile of the minor contributor occurred once in every 3,200 African-Americans, 5,800 Caucasians, and 7,900 Hispanics.

DNA testing of another cutting from the rear seat was also consistent with a mixture. Defendant's DNA profile was consistent with a major contributor, found once in 29 billion African-Americans, 300 million Caucasians, and 100 million Hispanics. Wilson could not be excluded as a minor contributor; the DNA profile occurred once in 40,000 African-Americans, 31,000 Caucasians, and 260,000 Hispanics.

A swab from the rear interior driver's side door handle was consistent with Wilson as the major contributor and defendant as the minor contributor. The probability of a random individual being the major contributor was 1 in 280 million African-

Americans, 1 in 3.6 million Caucasians, and 1 in 5.6 million Hispanics. A swab from an interior door was consistent with Wilson as the major contributor. The DNA profile occurred once in 710,000 African-Americans, 240,000 Caucasians, and 30,000 Hispanics.[2]

***Search of Defendant's Residence***

When the police searched defendant's residence, they asked defendant about the clothes he wore to the casino. He said his wife probably took them to the cleaners. When the police asked defendant's wife, she pointed out some clothes draped over exercise equipment in the bedroom. The last visit to the cleaners was a drop off on October 3 and a pick up on October 6.

On the kitchen table were printouts of Evidence Code sections 911 through 919, concerning privileges, and State Bar master rules and Penal Code section 1524 through 1524.4, concerning warrants. There were chips from Thunder Valley Casino in a dresser drawer.

***Expert Testimony***

An arborist testified there was a broken willow branch on defendant's property. He believed it had fallen due to wind and rain. On his first trip he found no poison oak; on a second

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[2] The senior criminalist who performed the DNA analysis testified to a case of contamination. He performed analysis on cuttings from a shirt seized from defendant's bedroom. One of the cuttings contained the criminalist's DNA.

trip he found poison oak near some oak trees, but no broken branch from which one could have fallen.

Dr. Connie Mitchell, an emergency room physician, testified about defendant's injuries and disputed that they were the result of falling from a tree. She found the injuries consistent with a struggle and scratching in close quarters. A corneal abrasion was more common in an assaultive encounter than an accident. She believed the parallel pattern of abrasions was more likely caused by fingernails than a tree branch. Defendant's injuries were consistent with blunt force trauma and grabbing of soft tissue. He had a classic claw injury. Bruises on his arm were suggestive of a bite mark, not falling from a tree. The lack of injuries to defendant's back and the few on his legs were more consistent with a fight than falling.

A dermatologist testified poison oak is an allergic dermatitis, characterized by red lesions with blistering. It generally appears 18 to 48 hours after exposure. If defendant was exposed Sunday, October 2, he should have had symptoms and itching by Wednesday, October 5, but the medical records from that date did not suggest poison oak. The doctor believed the abrasions on defendant's face were not poison oak; it is not associated with bruising.

Over defense objection, Detective Don Murchison testified that based on the witnesses' description of Wilson at the casino, Wilson exhibited symptoms consistent with consuming the

date rape drug. Those symptoms were slow or slurred speech, upset stomach, diarrhea, amnesia, impaired motor skills and a sleepy appearance. The drug was usually put in a fruity drink, such as wine, to mask its taste. The videotape did not show anyone drop anything in Wilson's drink.

***The Defense***

Defendant testified he did not kill, murder, rape or kidnap Wilson. He maintained he had nothing to do with her disappearance. He denied fighting with Wilson. Defendant was certain she was never in his car and he could not explain the presence of her hair or DNA in his car. It was part of his normal routine to wash his car and go to the dump. He claimed there was never a carpet or rug in his trunk and the baton was part of his son's martial arts gear. His injuries were due to a fall from a willow tree.

William Pence was in Folsom on October 5 and saw a woman. She asked if he knew where Thunder Valley Casino was. She explained she had had too much to drink the night before and left her car in the parking lot. She was trying to get back. When he told her the casino was 20 to 30 miles away, she said she would walk. When the police showed Pence a photographic lineup, he could not identify Wilson as the woman he saw. He thought she was wearing a sundress and perhaps sandals. After he heard about Wilson's disappearance on the radio, he saw a

picture of her on the internet and was 70 to 75 percent sure she was the woman he saw.

## DISCUSSION

### I.

### Motion to Suppress

**Defendant Consented to the Seizure of his Car**

Defendant contends the trial court erred in denying his motion to suppress evidence obtained from his car, a white Toyota Camry. Rather than challenging the search, which was conducted pursuant to a warrant, he challenges the initial seizure. He contends the warrantless seizure of his car was illegal because he did not consent; rather, he only submitted to the false claim of lawful authority. He further contends the police lacked probable cause to seize his car.

Defendant's motion to suppress was based, in part, on Sergeant McDonald's testimony at the preliminary hearing. McDonald testified that when he asked which car defendant drove to the casino, he said something to the effect that identifying the car would save the trouble of taking all of defendant's cars. Defendant argued he consented to the taking of his car only in face of McDonald's threat to take all his cars.

A seizure or search conducted without a warrant is presumptively unreasonable under the Fourth Amendment unless it falls within a well-defined exception. (*Katz v. United States* (1967) 389 U.S. 347, 357 [19 L.Ed.2d 576, 585]; *People v.*

*Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1196.) Valid consent to seize and search an item is an exception to the warrant requirement. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219 [36 L.Ed.2d 854, 858]; *United States v. Buckner* (4th Cir. 2007) 473 F.3d 551, 554.)

"Where, as here, the prosecution relies on consent to justify a warrantless search or seizure, it bears the 'burden of proving that the defendant's manifestation of consent was the product of his free will and not a mere submission to an express or implied assertion of authority. [Citation.]' [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 341.) "To ascertain if the prosecution has met its burden of establishing the consent exception to the warrant requirement, the trial court determines whether an officer's belief that he or she had consent to search is objectively reasonable under the circumstances. [Citation.]" (*People v. Lazalde* (2004) 120 Cal.App.4th 858, 865.)

"[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." (*Schneckloth v. Bustamonte, supra*, 412 U.S. at p. 227 [36 L.Ed.2d at pp. 862-863].) "The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, 'The power to judge credibility of witnesses,

resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings--whether express or implied--must be upheld if supported by substantial evidence.' [Citations.]" (*People v. James* (1977) 19 Cal.3d 99, 107.)

At the hearing on the suppression motion, McDonald testified to his two contacts with defendant on October 9. At the first meeting, defendant claimed Wilson left him in the parking lot to find her cell phone, so McDonald returned to the casino to check out this story. After reviewing an hour of the tapes, security reported Wilson was not seen returning to or entering the casino. McDonald then returned to defendant's and told him he needed a detailed statement. Defendant asked to call his friend, Pat Little, who is an attorney. Defendant called Little and they waited for him to arrive. McDonald told defendant they wanted to search his car. Defendant asked why and questioned what else the police had done to find Wilson.

In the meantime, McDonald had requested Detective Donald Pollock meet him at defendant's. Pollock arrived while they were waiting for Little. He stayed in his car.

When Little arrived, he spoke with defendant. Little announced that defendant wanted to cooperate fully and had nothing to hide. He asked what car they wanted to search and McDonald answered the car defendant drove the night Wilson

disappeared. In relation to Little confirming which car defendant drove, McDonald said it beats taking them all in. McDonald believed he had probable cause at that time to seize all of defendant's cars. He was unsure whether his statement about taking all the cars was before or after Little verified with defendant which car he had driven. Little came forward as the spokesperson with no resistance by defendant. Little gave consent to search the car.

Little testified he was a friend of defendant. He described the conversation about the car differently. In Little's version, McDonald was interested in taking the car defendant drove to the casino. McDonald said it was easier for defendant to give it to him, otherwise he would have to come back and take all the cars. Defendant then pointed to the Camry. Little denied he said defendant would cooperate, but admitted he said defendant had nothing to hide.

The trial court found inconsistencies and misstatements in McDonald's testimony, but found the People met the burden of proving the seizure of the car was based on defendant's voluntary action. The motion to suppress was denied.

The trial court decided the conflicting evidence on the issue of whether defendant consented to the seizure of his car in favor of the People. (*People v. Escobedo* (1973) 35 Cal.App.3d 32, 42 [conflicting evidence on consent resolved against defendant].) The court's finding that defendant's

consent to the seizure was voluntary is supported by substantial evidence. McDonald testified that once Little arrived, defendant was willing to cooperate. Although he could not recall the exact timing or words of his remark about taking all the cars, McDonald was certain it was an off-hand remark, not a threat. Little agreed that defendant had nothing to hide and Little did not object to any actions taken by the sheriff's department. Further, defendant went to the sheriff's office and gave a statement. His actions were consistent with voluntary consent to seize the car.

Defendant seizes upon the court's statement, "The court does consider that in this case, certain inconsistencies and misstatements on the part of the investigator have been demonstrated." Defendant contends this statement indicates the trial court did not entirely accept McDonald's testimony, nor entirely reject Little's. Therefore, defendant asserts, the court found consent regardless of the exact nature of the exchange between McDonald and Little. Defendant contends a finding of consent cannot be upheld if the consent was given only in the face of the threat to take all of defendant's cars. He argues McDonald's statement was a coercive representation that he had authority to seize all of defendant's cars. Its coercive nature was similar to the officer's announcement, when defendant's grandmother opened the door, that he had a search warrant in *Bumper v. North Carolina* (1968) 391 U.S. 543 [20

L.Ed.2d 797]. The grandmother's reply, "Go ahead," was found not to be consent, but the result of coercion. (*Id.* at p. 550 [20 L.Ed.2d at p. 803].)

We disagree with defendant's characterization of the court's comments. We view the court's statements in a light most favorable to support the ruling. (*People v. Jenkins* (2000) 22 Cal.4th 900, 969.) The court was simply acknowledging that McDonald's testimony had some inconsistencies as to the order of what happened and exactly what was said. Nonetheless, the court determined the facts established that defendant consented to the seizure of his car. Since we find there was voluntary consent, we need not address whether the officers had authority to seize all of defendant's cars.

**II.**

**It was Error to Use Defendant's Assertion of Fourth and Fifth Amendment Rights as Evidence of Guilt, but the Error Was Harmless Beyond a Reasonable Doubt**

During his interview of defendant on October 9, Sergeant McDonald asked defendant to walk him through the point where he left Wilson. Defendant asked why that was important and McDonald responded it was very important. McDonald reminded defendant they had his car and admonished defendant to tell him everything because the police were going to search his car for trace evidence. Defendant told his friend Little he needed a criminal attorney because there were too many questions and "this is going far too deep." McDonald said he could not ask

any more questions, but wanted to take a picture of defendant. Defendant refused, got up and left the interview.

The prosecution used this evidence as consciousness of guilt. In closing argument, the prosecutor focused on the interview and argued defendant was suppressing evidence. The prosecutor argued defendant buttoned up his shirt at the beginning of the interview; "what is he covering up?" The argument continued: "Holding his hands in front of the camera. Is this cooperation? If he had nothing to hide, why not just let him take some pictures? And then he leaves. Are these the actions of an innocent man?"

Defendant contends the trial court erred in admitting into evidence his refusal to permit Sergeant McDonald to take his picture and his leaving the interview room. This evidence came in through McDonald's testimony, a redacted videotape of the interview, and several stills from the videotape showing defendant putting his hands out to block the taking of a picture.

Defendant contends the admission of this evidence violated both his Fourth and Fifth Amendment rights. He contends his refusal to be photographed was an assertion of his Fourth Amendment right not to be seized or detained for the picture taking. Defendant contends that although he was not in custody, and thus had no rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*), the context makes clear he was

relying on his Fifth Amendment rights in terminating the interview. Recognizing that his trial counsel objected only on Fifth Amendment grounds, he contends he has not forfeited the Fourth Amendment contention. He notes the prosecution initially framed the issue in terms of the Fifth and Sixth Amendment, and contends the defense simply followed the prosecution's lead. He asserts the issue is the same whether raised under the Fourth, Fifth or Sixth Amendments -- whether a defendant's assertion of rights can be used against him. Finally, if this court finds forfeiture due to failure to raise the contention expressly in the trial court, defendant contends he was denied effective assistance of counsel. Defendant argues this evidence of consciousness of guilt played an important role in the circumstantial evidence case, so its erroneous admission was not harmless.

***Proceedings in the Trial Court***

Before trial, the People filed a trial brief on the admissibility of various statements by defendant. The People sought to introduce defendant's statements to McDonald on October 9, except his request for an attorney. The People claimed there was no issue under *Miranda* because defendant was not under arrest; the only significant issue was his request for counsel. The defense initially responded that the interrogation was involuntary because it was coerced by McDonald's threat to seize all of defendant's cars. Further, defendant had asserted

his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel.

At the hearing on the admissibility of defendant's statements, the defense argued admitting evidence of defendant's refusal to be photographed "flies in the face" of his rights to leave, retain counsel and remain silent. The People argued taking a picture was nontestimonial and did not implicate *Miranda* rights. The defense argued defendant's actions in ending the interview must be considered together; his refusal was tied to his request for an attorney and the right to remain silent. Both the Fifth and Sixth Amendments were implicated. The defense urged that defendant's assertion of the right to counsel and to remain silent was an assertion of constitutional rights, not evidence of a consciousness of guilt. The trial court ruled evidence of defendant's refusal to be photographed was admissible.

***Analysis***

We agree with trial counsel that when defendant ended the interview, he was asserting various constitutional rights: to not be detained, to not incriminate himself, and to have the assistance of counsel. In requesting a photograph, McDonald was attempting to obtain physical evidence from defendant. "[T]he obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels -- the 'seizure' of the 'person' necessary to bring him into

contact with government agents, [citation], and the subsequent search for and seizure of the evidence." (*United States v. Dionisio* (1973) 410 U.S. 1, 8 [35 L.Ed.2d 67, 76].) Here the second level is not a Fourth Amendment violation because taking a picture of someone is not a search. (*United States v. Emmett* (7th Cir. 2003) 321 F.3d 669, 672.) "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." (*Katz v. United States, supra,* 389 U.S. 347, 351 [19 L.Ed.2d 576, 582].) Defendant was not seized and brought into contact with the police; he voluntarily accompanied them to the interview. When he ended the interview, however, he withdrew his consent to the voluntary detention; at that point he asserted his Fourth Amendment rights.[3] The invocation of Fourth Amendment rights cannot be used to show guilt. (*People v. Wood* (2002) 103 Cal.App.4th 803, 809; *People v. Keener* (1983) 148 Cal.App.3d 73, 78-79.)

Whether a defendant has invoked his right to remain silent is to be determined from the facts and circumstances. (*People*

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[3] We recognize that this contention was not made as clearly to the trial court. Trial counsel focused on defendant's refusal to be photographed and did not mention the Fourth Amendment. Given trial counsel's argument that defendant was asserting his right to leave -- and since on appeal defendant contends any failure to adequately preserve the issue is ineffective assistance of counsel -- we address the merits without considering forfeiture.

*v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.) Here defendant stopped the interview once the questioning turned to "the most important part of everything." McDonald was asking defendant about his actions in leaving the casino with Wilson; as defendant was already under suspicion, his answers could be incriminating. Defendant understood this as he told Little the questions were getting "too deep" and he needed a criminal attorney. These circumstances "'lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment.'" (*People v. Riel* (2000) 22 Cal.4th 1153, 1189 [silence may not be used as adoptive admission if reliance on Fifth Amendment].)

The United States Supreme Court has not considered whether prearrest silence is protected by the Fifth Amendment. (*Jenkins v. Anderson* (1980) 447 U.S. 231, 236, fn. 2 [65 L.Ed.2d 86, 93].) There is a split of authority among the circuit courts. Focusing on the fact that defendant is not in custody, the Fifth, Ninth and Eleventh Circuits have held it is permissible to comment on defendant's prearrest silence. (*United States v. Zanabria* (5th Cir. 1996) 74 F.3d 590, 593; *United States v. Oplinger* (9th Cir. 1998) 150 F.3d 1061, 1066-1067; *United States v. Rivera* (11th Cir. 1991) 944 F.2d 1563, 1567-1568.) The Attorney General urges us to follow these cases. Defendant contends the decisions of circuit courts that have held the use of prearrest silence as substantive evidence of defendant's

guilt violates the Fifth Amendment are better reasoned. (*Combs v. Coyle* (6th Cir. 2000) 205 F.3d 269, 283; *United States v. Burson* (10th Cir. 1991) 952 F.2d 1196, 1201; *Coppola v. Powell* (1st Cir. 1989) 878 F.2d 1562, 1568; *United States ex rel. Savory v. Lane* (7th Cir. 1987) 832 F.2d 1011, 1017.) These cases rely on three Fifth Amendment principles: (1) the invocation of the privilege must be given a broad and liberal construction; (2) the invocation of the privilege requires no special words; and (3) the privilege can be asserted by a suspect during an investigation. (*United States v. Burson, supra*, at p. 1200.) "In a prearrest setting as well as in a post-arrest setting, it is clear that a potential defendant's comments could provide damaging evidence that might be used in a criminal prosecution; the privilege should thus apply." (*Combs v. Coyle, supra,* at p. 283.) We find the reasoning of these cases more persuasive. Because defendant was exercising his Fourth and Fifth Amendment rights in terminating the interview, the trial court erred in admitting into evidence that defendant ended the interview and left.

Under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710], a violation of a criminal defendant's federal constitutional rights requires reversal of the judgment unless the reviewing court determines "beyond a reasonable doubt that the error complained of did not contribute to the verdict." Applying that standard, we find the error in admitting evidence

of defendant's refusal to be photographed and termination of the interview was harmless beyond a reasonable doubt.

Certainly evidence that defendant stopped cooperating with the police once the questioning turned to the critical area that could incriminate him was powerful evidence of consciousness of guilt and evidence of consciousness of guilt was especially important in a circumstantial evidence case. In this case, however, there was overwhelming evidence of defendant's consciousness of guilt; almost all of his actions after Wilson's disappearance showed a consciousness of guilt. Defendant had suspicious injuries for which he offered differing explanations. He was growing a beard, perhaps to hide his injuries. His attendance at work was erratic despite the critical stage of his important project. He was extremely nervous when McDonald first contacted him. He took an alternate route home from the casino, but failed to tell the police about it. He was reluctant to point out the car he drove that night. When asked about the clothes he wore that night, he immediately said they were at the cleaners. He made a series of Google searches relating to forensics, date rape drugs and privileges. This evidence, combined with the medical evidence contradicting defendant's explanations of his injuries, and the forensic evidence that placed Wilson in the back seat and trunk of his car and indicated a violent struggle, was considerable evidence of defendant's guilt. The addition of his refusal to be

photographed and to continue the interview added little to the prosecution's case.

## III.

## The Trial Court Did Not Err in Admitting Evidence of Defendant's Bad Character at Work

Defendant contends the trial court erred, or trial counsel was ineffective, in admitting evidence of defendant's irascibility and violence at work.

Defendant's supervisor, Janet Wilde, testified at length about his erratic work schedule the days after Wilson's disappearance. Defendant was late for an important meeting, left early, failed to check in with his supervisor and telecommuted without prior approval. The prosecution used this evidence as consciousness of guilt; defendant failed to show up at work for an important project because something else concerned him more.

To rebut the idea that defendant had to be at work those days, on cross-examination the defense elicited testimony that defendant was one of the best program managers, had won an award, was a valued employee and would not be let go for failing to show up. The prosecution then asked Wilde about areas where defendant needed improvement. The defense objected, but the court overruled the objection, finding the defense opened the door to evidence of defendant's character at work. Wilde testified defendant did not always adhere to policies, such as timely submittal of expense reports and time sheets. Further,

defendant admitted he was a hothead and had been given coaching on how to approach people; he was warned that bodily contact was not always welcome. A female coworker had expressed concern that there could be violence due to defendant's demeanor. The complaint was investigated and was unsubstantiated.

Later, outside the presence of the jury, defense counsel raised the issue of character evidence, explaining he had been very careful not to introduce character evidence and that he sought only to show that defendant's attendance at work on October 5 was not required. The defense asked that Wilde's testimony of defendant's character at work be stricken. The court denied the motion, finding impeachment of defendant's character as to his employee status was proper. Counsel stated that if he had erred in not objecting to the prosecution's questioning on redirect, "then the ineffective assistance of counsel is on my shoulders."

Defendant contends evidence that he was a valued employee was not character evidence and did not open the door to evidence of his temper and the concerns of a female employee. He contends he has not forfeited the contention; any failure to object properly was excused by futility. Finally, he contends if a proper and timely objection was required, he was denied effective assistance of counsel. We need not address the issues of forfeiture and ineffective assistance of counsel because we

find the prosecution's character evidence was properly admitted under Evidence Code section 1102, subdivision (b).

Generally, evidence of a person's character is not admissible to show conduct on a specified occasion. (See Evid. Code, § 1101, subd. (a).) Evidence Code section 1102 provides an exception: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

"When a criminal defendant presents opinion or reputation evidence on his own behalf the prosecutor may present like evidence to rebut the defendant's evidence and show a likelihood of guilt. (Evid. Code, § 1102, subd. (b).)" (*People v. Hempstead* (1983) 148 Cal.App.3d 949, 953.) The defense offered evidence of defendant's reputation as a valued employee to show he was not required to be at work October 5 and his absence from work would not have adverse consequences. This evidence of his good character was offered to prove his conduct (absence from work) in conformity with such character. (Evid. Code, § 1101, subd. (a).) Thus, the prosecution was able to offer character evidence to rebut defendant's offer of good character. (Evid.

Code, § 1102, subd. (b).) The trial court did not err in admitting the evidence.

## IV.

## The Trial Court Did Not Err in Admitting Expert Testimony on Date Rape Drugs

Defendant contends the trial court erred in admitting, over defense objection, the expert testimony of Detective Murchison on date rape drugs. Defendant contends the expert opinion evidence was irrelevant because it had only a speculative connection to the facts of the case.

Murchison testified, over a relevancy objection, to his training and experience in the area of date rape drugs. He had undercover experience on the use and distribution of such drugs, experience in cleaning up methamphetamine labs and specific training on rave and date rape drugs. Over another relevancy objection, Murchison testified Wilson's symptoms the night she disappeared, as testified to by witnesses at the casino, and as he viewed on the casino tape, were consistent with the consumption of a date rape drug. He testified such drugs are often put in fruity drinks, like wine, to mask their taste.

"The trial court is vested with wide discretion in determining the relevance of evidence. [Citation.] The court, however, has no discretion to admit irrelevant evidence. [Citation.] 'Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section

210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose.' [Citations.]" (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

Defendant contends this expert testimony is speculative. There was no direct evidence that Wilson was given a date rape drug; Murchison testified the videotape did not show anyone put anything in her drink. Wilson's symptoms that night, her stomach ache and diarrhea, her mood change, and her clumsy handling of chips, are explained by other causes, including her alcohol consumption and evidence she was a poor loser when gambling. Defendant asserts the prosecution admitted, in closing argument, the speculative nature of the evidence when it admitted it did not know if defendant slipped Wilson something.

While Wilson's ambiguous symptoms might be a slight foundation for Murchison's expert testimony, they are not the sole basis. A week after Wilson's disappearance, and days after defendant was investigated by McDonald, he visited web sites relating to toxicology. He spent 23 seconds on a web site relating to rave or date rape drugs. From this evidence the jury could reasonably infer he was concerned about forensic discovery of date rape drugs if Wilson's body was found. Since Murchison's expert testimony on date rape drugs had a "tendency in reason to prove or disprove any disputed [material] fact," it was relevant. (Evid. Code, § 210.) The relative strength or weakness of such evidence was a determination for the jury.

(*People v. Cordova* (1979) 97 Cal.App.3d 665, 669.) The trial court did not err in admitting this evidence.

**V.**

**The Trial Court Did Not Err in Admitting McDonald's Testimony**

Defendant contends the trial court erred in permitting, over defense objection, McDonald to testify as to his investigation of the case and to give his opinions and conclusions as to what the evidence established. Defendant contends the actual steps of McDonald's investigation were irrelevant. McDonald's opinions, coming from a detective with 30 years' experience, carried "'an aura of special reliability and trustworthiness.' [Citation.]" (*People v. Bledsoe* (1984) 36 Cal.3d 236, 251.) The result, defendant contends, was the jury did not weigh the evidence as carefully as it should have.

The trial court sustained numerous defense objections when the prosecutor asked McDonald about investigatory steps in general or his opinion about the evidence. The court only permitted questions about what McDonald actually did in this case. Defendant argues this distinction sets the wrong parameters; the investigation itself was irrelevant. Defendant relies on *People v. Johnson* (2006) 139 Cal.App.4th 1135, in which the court held a database search for a "cold hit" on DNA was not subject to the standard of admissibility set forth in *People v. Kelly* (1976) 17 Cal.3d 24. (*People v. Johnson, supra,* at p. 1141.) The court stated: "[T]he means by which a

particular person comes to be suspected of a crime--the reason law enforcement's investigation focuses on him--is irrelevant to the issue to be decided at trial, i.e., that person's guilt or innocence, except insofar as it provides *independent* evidence of guilt or innocence." (*Id.* at p. 1150, original italics.)

We disagree that all evidence of McDonald's investigation was irrelevant and inadmissible. While the investigation may have been irrelevant to whether defendant was guilty of murder (except as it provided independent evidence of guilt), it was relevant to another facet of the case, to establish the corpus delecti. "In a homicide case, 'proof of death caused by a criminal agency' constitutes the corpus delicti. [Citation.]" (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 734.) Since Wilson's body was never recovered, the People had to establish that she was dead and had been killed. The actual steps of the investigation served to offer proof of that. Having rejected defendant's global contention, we turn to his specific claims of error.

***Testimony No One Confirmed Defendant's Story***

McDonald testified defendant originally claimed he got home at 1:00 a.m., but changed his story when told the videotape showed him leaving the casino at 1:13 a.m. Defendant said he got home around 2:00. The prosecutor asked if he attempted to confirm this with anyone defendant lived with and McDonald said yes. Asked if he was successful, McDonald said no. Defendant

contends his relevancy objection should have been sustained because McDonald's statement that he was unsuccessful in confirming defendant's return time home was an opinion. We disagree. McDonald did not testify no one could confirm defendant's story, only that he was unable to do so. To the extent it was an opinion, it was an admissible lay opinion rationally based on his experience and perception and helpful to a clear understanding of his testimony. (Evid. Code, § 800.)

***Testimony about Methodology and Experience***

McDonald testified to his methodology in collecting evidence and his training and experience in "no body" homicides. Defendant contends his relevancy objection to this testimony should have been sustained. The Attorney General responds this testimony merely laid the foundation for the thoroughness of the investigation, which was relevant to establishing that Wilson was dead. Evidence of the thoroughness of the investigation was also relevant to refute the defense assertion that the prosecution of defendant was a rush to judgment. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 446, fn. 15 [131 L.Ed.2d 490, 513] [conscientious police work will enhance the probative force of the People's evidence, while slovenly work will diminish it].)

***Testimony about Specific Categories of Evidence***

McDonald testified as to the specific categories of evidence he explored or directed others to explore; these included speaking with Wilson's family and friends and checking

electronic databases. When McDonald began to explain the importance of Wilson's state of mind, her upcoming job interview and her failure to take treasured possessions, such as her cat, the court sustained a defense objection.

Defendant objects this testimony was a commentary, not evidence. Since there was direct testimony from Wilson's family and friends as to Wilson's personality, her employment experience, anticipated new job, and evidence about the databases that were checked, we fail to perceive any prejudice from McDonald's testimony that these things occurred. As to the question about Wilson's state of mind, the objection was sustained and defendant did not move to strike McDonald's answer.

***Testimony of No Evidence of Suicide, Voluntary Disappearance or Third Party Abduction***

When the prosecutor asked McDonald about general steps of an investigation of a missing person, defense relevancy objections were sustained. The court also sustained objections to questions asking for McDonald's opinion. McDonald was permitted to testify, over objection that these were questions for the jury, that he found no evidence suggesting suicide, that Wilson started a new life, or that a third party abducted her and he had investigated those possibilities. Defendant contends this testimony was improper opinion testimony as the investigation was wide-ranging and not limited to finite physical evidence. He further contends it was irrelevant and

argumentatively cumulative of the other testimony and physical evidence. The Attorney General contends McDonald's testimony was proper expert opinion.

We disagree that this testimony was improper opinion testimony. Defendant contends the questions were similar to one found improper in *People v. One 1941 Chevrolet Coupe* (1952) 113 Cal.App.2d 578. That case was a forfeiture case where the issue was whether the vendor of the automobile made an adequate investigation into the buyer's moral responsibility. The trial court sustained an objection to a question that asked: "'And what did you find as a result . . . of that investigation?'" The appellate court held the ruling was correct; the question asked for an irrelevant conclusion. (*Id*. at p. 582.) Here the questions were different. When the prosecutor tried to elicit McDonald's conclusion or opinion, the court sustained the objection. McDonald was allowed to testify only as to what he actually found or did not find, not as to the conclusion he drew. Moreover, McDonald's actual findings regarding any alternate reasons for Wilson's disappearance were relevant to the prosecution's burden of proof on the threshold issue of whether a crime occurred.

***Testimony about Incapacitating Someone and Boot Camp***

Defendant objects to McDonald's testimony that served to bolster the prosecution case that defendant violently subdued

Wilson in the parking lot.[4] McDonald testified he had seen hair embedded in objects as a result of violent force. He further testified that while in boot camp in 1971, he became familiar with techniques to incapacitate someone quickly and that defendant served in the army and went through boot camp around the same time. Defendant contends expert opinion was not required in these areas and McDonald's testimony implied an ultimate opinion about defendant's guilt.

At trial, defendant objected to the testimony about embedded hair only on the basis of foundation. Since he did not object on the basis argued on appeal, that contention is forfeited. (Evid. Code, § 353, subd. (a).)

Defendant did initially object to the testimony about incapacitation and boot camp on the basis of relevancy, as well as that the question was leading. The testimony came in afterwards without objection. This testimony was not opinion evidence; it was based on McDonald's perceptions, both in boot camp and his investigation of defendant's military record.[5] It was relevant to establishing that defendant had the means to commit the crime.

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[4] As discussed below in part XII, the prosecution presented this scenario to establish felony murder predicated on kidnapping.

[5] There was no hearsay objection.

The trial court did not prejudicially err in admitting the testimony of McDonald.

**VI.**

**Admission of Exhibit 288 Was Within the Court's Discretion**

Defendant contends the trial court abused its discretion in permitting the prosecutor to create and then admit into evidence exhibit 288. Exhibit 288 consists of a large poster board showing in calendar form two weeks of October 2005, the 2d through the 15th. As witnesses testified, the prosecutor would place a small summary of their testimony on the appropriate date. The summaries were placed on three transparent overlays according to the person or entity whose activities were described. Exhibit 288A summarized Wilson's activities; exhibit 288B was for law enforcement and exhibit 288C for defendant. The net effect was a timeline showing the activities of the major players in the case over the critical time period.

In the course of trial many charts were used and the defense complained, "we're engaged in a trial by charts here essentially, and we're being overwhelmed by charts here that are being used as a substitute for the real evidence in this case." The defense lodged a specific objection to exhibit 288 and a continuing objection as summaries were placed upon it. When the People offered exhibit 288 A, B and C into evidence, defendant objected it was argumentative, misleading, irrelevant, inflammatory, in violation of Evidence Code section 352, and it

excluded exculpatory evidence. The court overruled the objection, finding the witnesses had verified the accuracy of the exhibit.

"It is hard to imagine an issue on which a trial judge enjoys more discretion than as to whether summary exhibits will be helpful. Nothing precludes their use with respect to oral testimony." (*Fraser v. Major League Soccer, L.L.C.* (1st. Cir. 2002) 284 F.3d 47, 67, fn. omitted.) To be sure, summary exhibits can pose a danger of prejudice. (See *United States v. Gaskell* (11th Cir. 1993) 985 F.2d 1056, 1061 & fn. 2 [noting that "[s]everal circuits have recognized that demonstrative exhibits tend to leave a particularly potent image in the jurors' minds"].) Defendant cites no authority that an exhibit like exhibit 288 is inadmissible. In *Barnes v. State* (Tex. App. 1990) 797 S.W.2d 353, 357, the court rejected a contention that allowing the use of charts to summarize testimony was error. "If the evidence which the charts summarize is admissible, the admission of summary charts into evidence, and their use before the jury, is within the discretion of the trial court. [Citation.] That a chart serves to emphasize testimony does not render it inadmissible. [Citation.]" (*Ibid*.)

Defendant has failed to show an abuse of discretion in admitting exhibit 288. He does not contend that exhibit 288 incorrectly summarized the testimony given at trial. Indeed, he does not dispute any fact shown on the exhibit. Rather, his

complaint is that the exhibit is one-sided, summarizing only evidence favorable to the People's case. Nothing in the record, however, indicates defendant was precluded from preparing his own exhibit summarizing, in a timeline, testimony favorable to the defense.

Defendant concedes such a summarizing exhibit may be appropriate in a case involving voluminous documentary evidence, but asserts it is not necessary in this case where witnesses testified only as to everyday types of events. We note, however, the case was long and complex; trial lasted nearly two months and there were almost 100 witnesses. The specific timing of the events testified to was important. The trial court did not abuse its discretion in admitting exhibit 288.

**VII.**

**There Was No Cumulative Evidentiary Error**

Defendant contends the cumulative effect of the evidentiary errors warrants reversal because the prosecution needed all the circumstantial evidence to convict defendant. Further, he contends their combined effect violated due process.

We have found only one evidentiary error: using defendant's invocation of the Fourth and Fifth Amendment rights to show guilt. As discussed above, this error was harmless beyond a reasonable doubt in light of the overwhelming other evidence showing consciousness of guilt. We find no cumulative evidentiary error.

## VIII.

## CALCRIM No. 220 Was a Proper Instruction

Defendant contends Judicial Council of California Criminal Jury Instructions (2006-2007), CALCRIM No. 220, which defines reasonable doubt, is an incorrect statement of law, or one that is likely to be applied in an unconstitutional manner.[6] Defendant contends the instruction is defective because it fails to give proper emphasis to a juror's individual subjectivity in the reasonable doubt standard, aggravates the ambiguity of the phrase "abiding conviction," and fails to convey that proof beyond a reasonable doubt requires a subjective certitude of the truth of the charge.

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[6] The court instructed the jury: "Ladies and gentlemen, the fact that a criminal charge or charges have been filed against the defendant is not evidence that the charge or charges are true. You must not be biased against the defendant just because he's been arrested, charged with a crime, or brought to trial. A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge or charges is or are true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he's entitled to an acquittal, and you must find him not guilty."

This court recently rejected the same contention in *People v. Zepeda* (2008) 167 Cal.App.4th 25, 29-32. Indeed, we found, "Defendant's argument borders on the frivolous." (*Id*. at p. 30.) Nothing in defendant's argument causes us to reconsider the issue.

**IX.**

**The Evidence Supported Giving CALCRIM No. 361**

The People requested the court give CALCRIM No. 361 on defendant's failure to explain or deny incriminating evidence based on defendant's failure to explain the forensic evidence found in his car and his failure to explain the absence of his injuries on October 4. The defense opposed giving the instruction, arguing defendant did explain his injuries and he was not required to explain all the forensic evidence. When asked about this evidence, defendant testified he did not know how it got in his car. The court found it was within the possible range of evidence for defendant to explain the forensic evidence in his car. The court agreed to the defense suggestion to modify the instruction by adding "If the jury finds" at the beginning.

The court instructed the jury: "If the jury finds that the defendant failed in his testimony to explain or deny evidence against him and if the jury finds he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating the evidence. Any

such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

In order to give the instruction, the trial court must determine if (1) a question was asked that called for an answer explaining or denying incriminating evidence; (2) defendant knew the facts necessary to answer the question; and (3) in answering, defendant failed to explain or deny the incriminating evidence. (*People v. Saddler* (1979) 24 Cal.3d 671, 682-683; *People v. Marsh* (1985) 175 Cal.App.3d 987, 999.)

Defendant contends the trial court erred in giving this instruction. He argues the instruction is improper with respect to Wilson's hair in his car for three reasons. First, he contends, the instruction is inappropriate when the inference of guilt it permits is not within the potential range of evidence in support of the defense case. "[I]f the defendant does not answer such a question because of some fact which precludes his knowledge of it (like an alibi which removes him from the scene), a denial of guilt is deemed to have been made. [Citation.]" (*People v. Mask* (1986) 188 Cal.App.3d 450, 455.) Defendant contends that since he denied Wilson was ever in his car, he need not explain or deny the presence of her hair in his car. As the trial court found, defendant's denial that Wilson was in his car does not preclude his knowing how her hair got in

the handle or the trunk, particularly since he admitted he was with her that night and they walked towards his car. Under defendant's theory, the instruction could never be given if a defendant denied the crime because the inference drawn from the incriminating evidence would always be outside the range of evidence in support of the defense case.

Second, defendant argues he is not required to explain "the highly technical and arcane methods used for DNA analysis." That may be, but he could still offer an explanation for the presence of the hair.

Third, defendant asserts he was never asked why Wilson's hair was on or in his car. Defendant is mistaken. The prosecutor asked, "How do you explain her hair in your door handle?" Defendant replied, "Don't know. I cannot give you that answer. You tell me." Later in cross-examination he was asked: "Do you have any explanation for us why what's identified as being a hair matching a full profile of Christie Wilson[,] why that hair was in the trunk of your vehicle?" Defendant said, "Don't know sir."

The trial court did not err in instructing with CALCRIM No. 361.

## X.

## No Evidence Supported an Instruction on Third Party Culpability

Defendant contends the trial court erred in denying his request for an instruction on third party culpability.[7] He contends there was substantial evidence implicating Burlando, Wilson's boyfriend, sufficient to raise a reasonable doubt as to defendant's guilt.

Upon proper request, a defendant has a right to an instruction pinpointing his defense of third party culpability when there is sufficient evidence linking any particular third person to the actual perpetration of the crime. (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80.) The test for sufficient evidence of third party culpability is set forth in *People v. Hall* (1986) 41 Cal.3d 826, 833: "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need

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[7] The defense requested an instruction reading as follows: "In the event that you find that the offense of murder or manslaughter has been committed, you have heard evidence that a person other than the defendant committed the offenses. The defendant is not required to prove the other person's guilt. It is the prosecution that has the burden of proving the defendant guilty beyond a reasonable doubt. Evidence that another person committed the charged offense may by itself leave you with a reasonable doubt as to the defendant's guilt; however, its weight and significance, if any, are matters for your determination. [¶] If after considering all the evidence, including any evidence that another person committed the offenses, you have a reasonable doubt that the defendant committed the offenses, you must find the defendant not guilty."

only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. As this court observed in [*People v.*] *Mendez* [(1924) 193 Cal. 39], evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (Accord, *People v. Cunningham* (2001) 25 Cal.4th 926, 996; *People v. Bradford* (1997) 15 Cal.4th 1229, 1325 [Evidence of the culpability of a third party must link the third person either directly or circumstantially to the actual perpetration of the crime].)

In this case there was no direct or circumstantial evidence linking Burlando to the crime. There was no evidence he was at Thunder Valley Casino the night Wilson disappeared. There was no forensic evidence linking him to her disappearance. Burlando had no injuries after that night and no erratic behavior; instead, he reported Wilson as missing and cooperated fully in the police investigation.

Defendant admits the evidence linking Burlando to the crime is evidence of only motive and opportunity. Burlando and Wilson had a tumultuous relationship, punctuated by violence. They had both cheated on the other. Burlando had previously hidden from

Wilson at the casino, so she would not know he was there. He had no alibi after 11:00 p.m. on October 4. He failed to contact the police until the 6th, and refused an offer from friends to go to the casino to look for Wilson the night of the 5th. There was also a dispute about when and how often he called her the night she disappeared. Burlando had a stun gun in his car.

Defendant argues, however, this evidence is not "mere motive and opportunity," such that it is insufficient to raise a reasonable doubt. (*People v. Hall, supra,* 41 Cal.3d at p. 833.) He argues the strong evidence of motive and opportunity was sufficient to provide a direct link between Burlando and the crime. He contends this sort of motive and opportunity evidence was found sufficient in *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1082.

In *Martinez*, defendant, who worked in a criminal defense attorney's office, was convicted of embezzling money a client provided for bail. (*People v. Martinez, supra*, 103 Cal.App.4th at pp. 1074-1075.) On appeal, he contended the prosecution withheld material evidence: pending criminal charges against the office manager. The Attorney General countered such evidence would not have raised a reasonable doubt as to defendant's guilt. (*Id*. at p. 1082.) The appellate court disagreed, agreeing with defendant that impeaching the office manager with such evidence would have shifted the tenor of the

trial and made the office manager a more plausible suspect. Defendant claimed the office manager had told him to secrete the money in a cabinet, the money was not reported missing until the office manager returned from vacation, and there was testimony from others concerning money problems in dealing with the office manager. (*Ibid*.)

We find *Martinez* distinguishable. While the evidence against the office manager went to motive and opportunity to commit the embezzlement, the evidence also tied him directly to the missing money, as he allegedly gave the instructions on what to do with it and it was missing only after he returned. That link is missing here; there is no evidence tying Burlando to Wilson's disappearance.

**XI.**

**There Was No Cumulative Instructional Error**

Defendant contends the combined effect of the instructional errors was prejudicial under any standard of review. Since we find no error in the instructions, we reject this contention.

**XII.**

**There Was Sufficient Evidence of First Degree Murder**

Defendant contends there is insufficient evidence of first degree murder.[8] He contends there is no evidence to establish

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[8] Defendant does not challenge the sufficiency of the evidence that he killed Wilson; he admits the evidence is

either premeditation and deliberation or a kidnapping and a conviction cannot be based on speculation and conjecture.

The jury was instructed on two theories of first degree murder: premeditation and deliberation and felony murder based on kidnapping. While the prosecutor mentioned both in closing argument, he submitted that felony murder was the stronger theory. We thus first consider if there is substantial evidence of felony murder predicated on kidnapping.

"In reviewing a challenge to the sufficiency of evidence, the reviewing court must determine from the entire record whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

"Substantial evidence is '"evidence which is reasonable, credible, and of solid value."' [Citation.] Although 'mere speculation cannot support a conviction' [citation], the trier of fact is entitled to draw reasonable inferences from the

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"sufficient to establish a criminal homicide." He challenges only the degree of homicide.

evidence and we will '"'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'"' [Citations.]" (*People v. Bohana* (2000) 84 Cal.App.4th 360, 368.)

The standard of review remains the same in a case based upon circumstantial evidence. (*People v. Proctor* (1992) 4 Cal.4th 499, 528-529.) We must decide whether the circumstances reasonably justify the jury's findings, but "our opinion that the circumstances also might reasonably be reconciled with a contrary finding would not warrant reversal of the judgment. [Citation.]" (*Id*. at p. 529.)

A killing committed in the perpetration of certain felonies, including kidnapping, is first degree murder under the felony-murder rule. (Pen. Code, § 189; *People v. Seaton* (2001) 26 Cal.4th 598, 664.) The People did not charge defendant with kidnapping, but such a charge is not necessary for a prosecutor relying on the felony-murder rule, so long as the elements of that offense are proved. (*People v. Scott* (1991) 229 Cal.App.3d 707, 716.) "Generally, to prove the crime of kidnapping, the prosecution must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. (§ 207, subd. (a).)" (*People v. Jones* (2003) 108 Cal.App.4th 455, 462, fn. omitted.)

Defendant contends there is no evidence of a kidnapping in the parking lot because there is no evidence of movement by force or fear and without consent. The videotape of defendant and Wilson leaving the casino does not show any force or struggle. No altercation was reported in the parking lot at the time defendant and Wilson left the casino. Defendant argues that even if the presence of Wilson's DNA and hair in the car indicates she was in his car, there is still no evidence of force. Defendant contends her absence from the video when the car left could have meant she was lying down as a result of her intoxication.

We find sufficient evidence of kidnapping. The evidence indicated defendant wanted to leave the casino with Wilson. He flirted with her, bought her drinks, lent her money, listened sympathetically to her problems and offered to help. He tried several times unsuccessfully to get her to leave. When she was ready to leave, or about to be ejected, he left with her without cashing in his chips.

The surveillance videotape shows defendant and Wilson leaving; there is ample time for defendant to subdue her before the car leaves the parking lot. As they leave the casino, defendant takes Wilson's arm and steers her towards his car; she pulls away. Walking into the parking lot, defendant puts his arm around Wilson and she again moves away. There are several flashes, indicating the car doors are unlocked, but there is a

gap of over three minutes until the car lights are turned on and the car leaves. That defendant forced Wilson into the car during this time period is corroborated by her hair found wedged in the passenger exterior door handle. It required force to dislodge the hair from her head and force to embed it in the exterior door handle. Wilson is not visible in the car when it leaves the parking lot, indicating she is not likely a willing or conscious passenger. Since the videotape does not indicate she is so drunk that she staggers, it is unlikely she is simply lying down on her own. As such, she is an improbable companion looking forward to further evening activities with defendant.

Wilson was never seen again. Her car remained in the casino parking lot. Defendant's injuries and the DNA and blood in the car indicate there was a violent struggle later with the door open. Wilson, a kick boxer taught to defend herself by her stepfather, fought defendant off to no avail. During the fight defendant killed Wilson. He then disposed of her body in an unknown location. There is sufficient evidence of felony murder predicated on kidnapping.

Defendant contends that even if there is sufficient evidence of felony murder, the first degree murder conviction must be reversed because there is insufficient evidence of deliberate and premeditated murder. Relying on *People v. Guiton* (1993) 4 Cal.4th 1116, defendant asserts that because the general jury verdict makes it impossible to determine on which

theory the jury relied, the conviction must be reversed. We need not determine if there is sufficient evidence of deliberate and premeditated murder because defendant misreads *Guiton*. Where the prosecution presents the jury with both a factually sufficient and a factually insufficient ground for conviction, and it cannot be determined on which ground the jury relied, we affirm the conviction unless there is an affirmative indication that the jury relied on the invalid ground. (*People v. Guiton, supra*, at pp. 1128–1129.) Here there is no indication the jury relied on deliberate and premeditated murder. Since the prosecutor argued the evidence "is strongest on this theory" of felony murder, it is likely the jury based its decision on felony murder, for which the evidence is ample.

Because we find sufficient evidence to support a first degree murder conviction, we need not address defendant's remaining contentions regarding the proper degree of homicide.

**DISPOSITION**

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.

CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARIO FLAVIO GARCIA,<br><br>Defendant and Appellant. | C054729<br><br>(Super. Ct. No. 62055517)<br><br>**ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION AND DENYING REHEARING** |

APPEAL from a judgment of the Superior Court of Placer County, Larry D. Gaddis, Judge. Affirmed.

Mark D. Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans, Supervising Deputy Attorney General, Robert Gezi, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I and III through XII.

THE COURT:

The opinion in the above-entitled matter filed on February 25, 2009, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published with the exception of parts I and III through XII in the Official Reports and it is so ordered.

Appellant's petition for rehearing is denied.

BY THE COURT:

BLEASE, Acting P.J.

ROBIE, J.

CANTIL-SAKAUYE, J.